SOUTHERN MINING & TRADING SDN. BHD. v. UNITED MINING (SINGAPORE) CO. PTE. LTD.

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F. JJ.) March 10, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 28 of 1974]

Equity — Agreement relating to payment of tribute on iron ore mined — No sublease executed — Rights recognised and payments made.

In this case the facts were that one Suzuki entered into a written agreement with Che Habsah binte Ahmad the holder of the mining lease to certain lands in Pahang. Under the terms of the agreement Suzuki was to be given a sublease of the land but until then the agreement would be valid. Suzuki assigned his rights to a company called Federal Agencies (Malaysia) Ltd., who gave him a letter of guarantee under which tribute was to be paid to him. Che Habsah subsequently gave a sublease of the land to one Lum Chik Thong who in turn subleased the land to Metal Timor Ltd., a sister company of the Federal Agencies (Malaysia) Ltd. Suzuki was assured that the companies would honour the letter of guarantee and in fact payment of various sums were made to him. Metal Timor Ltd., made an agreement with the respondents giving them the right to mine the land and they authorised the respondents to pay Suzuki tribute, to be deductable from the tribute payable to them under the agreement. Suzuki founded the appellant company with himself as managing director and he assigned his rights under the letter of guarantee to the appellant company. Tributes were paid to the appellant company for some time and then ceased. The appellant company thereupon sued the respondents for accounts and payment of tribute. In the High Court the action was dismissed as the learned trial judge held that the letter of guarantee gave Suzuki no legal rights to the tributes. The appellant company appealed.

Held: justice in this case requires that that the respondents should continue to pay the appellants the tributes in accordance with the letter of guarantee. A court of equity will not allow the respondents to deny others of their rights. The documents produced at the trial may not have spelt out all those rights but there could be no denying the fact that the respondents recognised these rights when they paid Suzuki or his assignees the tributes.

FEDERAL COURT.

V. Balendran (*Michael Chong* with him) for the appellants.

Chin Yew Meng for the respondents.

Ali F.J.: This is an appeal against the dismissal of the appellants' action by the High Court at Kuantan, Pahang.

The appellants, a limited company registered in Kuantan, sued the respondents, a limited company registered in Singapore, for accounts and payment of tributes on all iron and manganese ores removed from a parcel of mining land at Tasek Chini, Pahang.

The facts not in dispute or not seriously in dispute are as follows: On August 19, 1964 a Japanese named Nobuo Suzuki entered into a written agreement with Che Habsah binte Ahmad, the holder of the mining lease to the land and who at the time was applying for a mining certificate. By this agreement Suzuki was promised a sub-lease in consideration of certain works which were to be carried out by him. Clause 3 of the agreement provided that the agreement is valid until the Second Party (Suzuki) obtain the said sublease from the First Party (Che Habsah). In the meantime, Suzuki, by a Deed of Assignment dated April 3, 1965, assigned his rights under the said agreement to a company called Federal Agencies (Malaysia) Ltd. of No. 34-1 & 2, Jalan Shabandar, Batu Pahat, Johor. On June 25, 1965 he received from the company a letter, described as a letter of guarantee. It was in the following terms:

25th June, 1965

"Mr. Nobuo Suzuki,
22, Workshop Road,
Kuantan.

Dear Sir,

Letter of Guarantee

We, the Directors of Federal Agencies (Malaysia) Ltd. do hereby agree and guarantee that you and Che Habsah binte Ahmad have an Agreement dated 19th August, 1964, regarding mining areas at Tasek Chini which are now being surveyed by the Government Surveyor in the Mukim of Penyor and in the District of Pekan. The aforesaid Agreement has been agreed by both Parties to be cancelled and a fresh Agreement to be made between Mr. Lum Chik Thong of Singapore and our Company subject to the terms and conditions as follows:

We shall pay you tribute as follows:

(a) Iron ore tribute Fe — $1.00 per dry long ton.
Mn. ore tribute 40% & above — $2.00 per dry long ton.
Mn. ore tribute 35% & up to 39.99% — $1.35 per dry long ton.
Mn. ore tribute 34.99% & below — $1.00 per dry long ton.

(b) Advance of $50,000 will be paid to you upon issue of Sub-Sub-lease to our Company.

(c) M.C. premiums, survey fees and rentals for access road for 5 miles to be recovered from the M.C. Holder as per above Agreement to be paid to you on the day of cancelling the above agreement.
($7,557.90 + $224.25 + $200.00)

(d) Our letter of undertaking to you dated 3rd April, 1965 is hereby cancelled.

(e) The above tribute will be paid on every shipment after one week of the vessel leaving the Pekan Port, and the balance will be paid in full on the final report from the buyers.

(f) A proper agreement in detail will be made with you as soon as our Company have entered into a new Agreement with Mr. Lum Chik Thong.

The terms and conditions hereof shall be binding on the executors, administrators and assigns of yours and ours.

Yours faithfully,
Sd. Illegible
Sd. Illegible.
Sd. Illegible."

The next day, i.e. on June 26, 1965, Che Habsah entered into a written agreement whereby she gave a sub-lease to a Mr. Lum Chik Thong who subsequently by an agreement dated August 10, 1966 gave a sub-sub-lease to a company called Metal Timor Ltd. Both Metal Timor and Federal Agencies appeared to have not only the same address No. 34-2, Jalan Shabandar, Batu Pahat, but also the same shareholders and directors. Suzuki's evidence at the trial was that he went to Batu Pahat to find out the reason or reasons why the sub-sub-lease was given to Metal Timor and not to Federal Agencies as was envisaged in the letter of guarantee. He was told that the two companies were "sister companies" and that either of them would honour the letter of guarantee. They did in fact honour it for between 1967 and 1968 or 1969 Suzuki was paid various sums of money as advances towards tributes. In all he was paid $26,000 which was part of the $50,000 advance promised in the letter of guarantee.

By a written agreement dated February 1, 1969 Metal Timor Ltd. decided to give the respondents

the rights to mine the said land for which the respondents undertook to pay tributes at the rate of $1.30 per dry long ton for iron ore and $2.20 for manganese ore. Around this time the appellant company was formed with Suzuki as the managing director. Sometime in May, 1969 the Chairman of the Company's Board of Directors wrote to Federal Agencies and the respondents pointing out the need to replace the letter of guarantee by a proper agreement in order to avoid future difficulties. A draft agreement was sent but for some reason or reasons had not been agreed to by the necessary parties. In August, 1969 Metal Timor wrote to the respondents twice. In the letter dated August 4, 1969 Metal Timor Ltd. wrote —

4th August, 1969

"M/s United Mining (S) Co. Pte. Ltd.
58-B. South Bridge Road,
Singapore 1.

Dear Sirs.

With reference to our Agreement dated 1st February, 1969, we request that you be kind enough to make payments direct to Mr. Nobuo Suzuki of 22, Jalan Haji Abdul Rahman, Kuantan based on $1.00 per dry long ton of iron ore for each shipment exported from Pekan.

Please note that payments made to Mr. Nobuo Suzuki shall be deductable from the tribute payable to us under the terms of the said Agreement.

Yours faithfully,
METAL TIMOR SDN. BERHAD.
Sd. Illegible
Dy. Managing Director.

c.c.
Mr. Nobuo Suzuki, Kuantan."

On August 11, 1969 they wrote as follows —

11th August, 1969

"M/s United Mining (S) Co. Pte. Ltd.
58-B South Bridge Road.
Singapore 1.

Dear Sirs,

Further to our letter dated 4th instant, we now wish to enclose herewith a letter from Mr. Nobuo Suzuki writing to us in his capacity as Managing Director of Southern Mining & Trading Sdn. Bhd. Kuantan, in respect of the payment of iron ore tribute for your reference.

We shall appreciate it very much if you will kindly make payment direct to Southern Mining & Trading Sdn. Bhd. as requested by Mr. Nobuo Suzuki as soon as possible.

Yours faithfully,
METAL TIMOR SDN. BERHAD.
Sd. Illegible
Dy. Managing Director.

c.c.
M/s Southern Mining & Trading Sdn. Bhd.,
Kuantan."

In response to this letter the respondents in September and October 1969 paid the appellants a total sum of $9,218.00 as tributes from the first shipment of ore at the rate as specified in the letter of guarantee.

On October 5, 1969 the respondents wrote to Suzuki as follows:

5th October, 1969

"Mr. N. Suzuki,
c/o M/s Southern Mining &
Trading Sdn. Berhad,
22, Jalan Haii Abdul Rahman,
Kuantan, Malaysia.

Dear Sirs,

Re: Tribute of Chini Mine — Pekan

We are in receipt of a letter of the 1st instant from Messrs. Southern Mining & Trading Sdn. Berhad. We shall be pleased to comply with their request that future tribute be paid to them provided that an agreement of assignment made between yourself and the said firm, duly signed and stamped, was received by us.

Yours faithfully,
UNITED MINING (SINGAPORE)
CO. PTE. LTD.
Managing Director."

This was complied with the execution of a Deed of Assignment dated October 11, 1969 by Suzuki and the appellants. Even after this the respondents made further payments of tributes. In a letter dated October 16, 1969 they wrote —

16th October, 1969

"M/s Southern Mining &
Trading Sdn. Berhad,
22, Jalan Haji Abdul Rahman,
Kuantan, Pahang.

Dear Sirs,

As spoken over the telephone this morning between vour Mr. N. Suzuki and our Mr. Tay Yew Hock, we have pleasure in enclosing herewith our cheque No. KLA 178179 drawn on the U.M.B.C. — K.L. for S$8,356.00.

This amount being in payment of tribute for iron ore shipped per M. V. CRYSTAL. The tonnage shipped was 9,183 wet long tons; less 9% for moisture content. Thus we have a tonnage of 8,356 dry long tons.

Yours faithfully,
UNITED MINING (SINGAPORE)
CO. PTE. LTD.
Sd. Illegible.
Managing Director."

Except for a small payment of $781.00 in March, 1970 they made no further payment. Following unsuccessful demand for further payments the appellants on August 25, 1970 commenced action.

Strictly on the pleadings (see paragraph 7 of the amended statement of claim) the case for the appellants is that the respondents having been paying tributes in accordance with the letter of guarantee are in equity bound to continue with the payments. The respondents' answer in paragraph 5 of the amended defence statement was that the payments made were merely to accommodate the appellants. Having clearly agreed to make the payments I cannot regard the answer as a valid defence. The respondents also questioned the effectiveness of the Deed of Assignment dated October 11, 1969. Alternatively the respondents contended that the appellants' rights to the tributes are subject to equities.

The learned trial judge did not consider it necessary to deal with the issues (1) whether or not the assignment was effective and (2) whether or not the appellants' rights are subject to equities. These issues were suggested by counsel for the appellants at the opening of the trial. On the legal effect of the letter of guarantee he held that it gave Suzuki no rights to the tributes. In his view since Federal Agencies never got the sub-lease there was nothing which they could give. In my view the letter of guarantee gave Suzuki not an immediate but future rights to tributes. The evidence clearly established that in between Federal Agencies, Lum Chik Thong and Metal Timor there was some kind of arrangement whereby each would have a share in the profits to be derived from the mining of the land. Lum Chik Thong obviously had no intention of mining the land. As between Federal

Agencies and Metal Timor Ltd., one or the other could have carried out mining works but between them it was decided that the respondents would do it. The respondents knew or had reason to know the rights of the parties involved in the arrangement. They knew that Suzuki was originally involved in getting the sub-lease from Che Habsah and that he stood to get a share out of the profits from the land. They also knew that as long as each recognised the other's rights to the tributes the absence of proper documents did not matter very much.

Now that a dispute is before the court the respondents insist on proper documents. In the light of the evidence in this case I do not think a court of equity will allow them to deny others of their rights. The documents produced at the trial may not have spelt out all those rights but there is no denying of the fact that the respondents recognised those rights when they paid Suzuki or his assignees the tributes. In all the circumstances of this case justice requires that the respondents should continue paying the appellants the tributes in accordance with the letter of guarantee. I would, therefore, allow this appeal.

On the question whether the appellants' rights to the tributes are subject to equities this can only be answered after the accounts have been taken.

Accordingly, I would set aside the judgment of the trial court and enter judgment for the appellants with costs in terms of the prayers set out in the statement of claim.

The appellants shall also have the costs of this appeal.

Gill C.J. (Malaya) and **Ong Hock Sim F.J.** concurred.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Allen & Gledhill.*

SIO KOON LIM & ANOR. v. S.B. MEHRA

[F.C. (Ali and Wan Suleiman F.JJ. and Syed Othman J.) March 10, 1975]
[Johore Bahru — Federal Court Civil Appeal No. 79 of 1974]

Practice and Procedure — Specially indorsed writ — Application for summary judgment — Whether writ a nullity — Claim not founded on allegation of fraud.

The respondent had by a specially indorsed writ claimed accounts of a partnership. The appellants applied to have the writ dismissed or struck out on the ground that the writ specially indorsed was a nullity as the claim was founded on an allegation of fraud. The learned trial judge dismissed the application and the appellants appealed.

Held, dismissing the appeal: the respondent's action in this case was not founded on any allegation of fraud and therefore the learned judge was right in holding that the writ was not a nullity. The cause of action was based on an alleged breach of the agreement for dissolution of the partnership and the alleged fraud had nothing to do with the respondent's present cause of action.

Cases referred to:-

(1) *Khong Kim Ching* v. *Hassan bin Din & Ors.* [1973] 2 M.L.J. 173.

(2) *Grant Advertising International Inc. & Anor.* v. *Glaze* [1968] 1 M.L.J. 31.

FEDERAL COURT.

H. B. Ball for the first appellant.

A. K. Bashir for the second appellant.

V. Krishnan for the respondent.

In the court below, A. K. Bashir appearing for the applicants/defendants and V. Krishnan for the respondent/plaintiff, the following judgment was delivered on July 15, 1974:

Ibrahim J.: In this Summons-in-Chambers No. J 9/74 dated February 15, 1974 (encl. 246) defendants have applied for the following orders:

(1) That this action be dismissed and/or struck out and/or all proceedings herein be set aside with costs on the grounds that the Writ of Summons herein is nullity, alternatively,

(2) That this action be dismissed for failure to furnish or comply with Order for security for costs

and (3) That costs of this application and/or this action be taxed and paid by plaintiff to defendants.

On May 14, 1974 the court dismissed the application with costs. Defendants are appealing against that decision after a certificate under O.54 r.22A of the Rules of the Supreme Court, 1957 has been given on May 25, 1974 that no further argument was required.

It is necessary to go over the progress of the action itself in order to better appreciate this application and perhaps its dismissal with costs.

A Specially Indorsed Writ was originally filed in and sued out by the Muar High Court as Civil Suit No. 122 of 1972 on October 7, 1972 (encl. 2). An Amended Statement of Claim (encl. 19) was filed on October 15, 1972 and the prayers as amended read as follows:

(i) Judgment against the first defendant in the sum of $85,000/- together with interest on all monies outstanding at the rate of one (1) percent per month with monthly rests.

(ii) That the defendants do within five (5) days from the date of service of this order on them deliver all the books of account of the partnership to Mr. Allan Lim Aik to inspect and to take all proper accounts and inquiries concerning the partnership.

(iii) An order for payment by the defendants to the plaintiff of any sum found due upon taking such account.

(iv) An order that a receiver of the assets of the said partnership be appointed.

(v) Any consequential orders as the Honourable Court may deem fit to make.

(vi) Costs of this action on the basis of solicitor and client to be taxed by an officer of this court and be paid by the defendants to the plaintiff when so taxed.

Prayers (i) and (iii) are new prayers added by the amendment. Paragraph 5 of the Statement of Claim reads as follows:

"Sometime in August 1972 the plaintiff discovered that the first defendant had on 27th July, 1972 *fraudulently,* dishonestly and in breach of the said Agreement registered a business known as 'Kingwood Timber Industries' with the first defendant and one Lim Pat Luan the second defendant (who was then employed as a Manager) as the partners thereof."

On the same day that the Writ was filed an application was made by planitiff by Notice of Motion (encl. 4) for an interim injunction "restraining the defendants . . . from damaging, removing, carrying away or disposing with any of the stock-in-trade belonging